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Attorneys for Plaintiff
American Tire Distributors, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

AMERICAN TIRE DISTRIBUTORS,
INC., a Delaware corporation,

Plaintiff,

v.

AMERICAN TIRE CORPORATION,
unincorporated business with an address
in El Monte California, ABRAHAM
HENGYUCIUS, a individual and DOES
1 THROUGH 10,

Defendants.

CASE NO.: CV08-2971 MMM

**DECLARATION OF
KATHLEEN MCCARTHY IN
SUPPORT OF PLAINTIFF
AMERICAN TIRE
DISTRIBUTORS, INC.'S
OPPOSITION TO
DEFENDANTS' MOTION TO
SET ASIDE DEFAULT**

Date: March 2, 2009
Time: 10:00 a.m.
Before: Honorable Margaret M.
Morrow
Location: Courtroom 780

1 I, Kathleen McCarthy, hereby declare the following:

2 1. I am a partner with the law firm King & Spalding LLP, counsel for
3 Plaintiff American Tire Distributors, Inc. ("ATD"). I have personal knowledge of
4 the facts set forth in this declaration and can testify competently to those facts.

5 2. Attached hereto as Exhibit 1 is a true and correct copy of a cease-and-
6 desist letter sent to Defendant American Tire Corporation ("ATC") by John L.
7 Sullivan, Jr. of Alston & Bird LLP, former counsel for ATD, dated September 7,
8 2006.

9 3. Attached hereto as Exhibit 2 is a true and correct copy of a cease-and-
10 desist letter sent to Defendant ATC by Jason M. Sneed of Alston & Bird LLP,
11 former counsel for ATD, dated July 6, 2007.

12 4. Prior counsel advised that they were satisfied that Defendants in fact
13 received the correspondence since it was emailed and faxed to Mr. Hengyucius and
14 mailed to all three addresses located for ATC (in El Monte, California, Chino,
15 California and Elizabeth, New Jersey). Prior counsel further advised that they did
16 not receive any response to the cease-and-desist letters.

17 5. Before and after suit was filed, a series of investigations were
18 conducted regarding Defendants. The investigators reported that corporate records
19 for Defendant ATC could not be located in either the States of California or New
20 Jersey. Corporate records for a company called American Seashores International,
21 Inc. ("American Seashores") were located in California and New Jersey.
22 Numerous sources, including Internet websites that appeared to be operated by
23 Defendants and owned by the same entity as Defendants' americantire.us website,
24 indicated that American Seashores is also operated by Defendant Hengyucius and
25 is related to Defendant American Tire Corporation. Investigators could find no
26 personal address, driver's license or Social Security information for Defendant
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1 Hengyucius and found indications that Defendant Hengyucius also acted under the
2 names Zhang Hengyu, Hengyu Zhang and Albert Hy.

3 6. Attached hereto as Exhibit 3 is a true and correct copy of the
4 Complaint filed in this action on May 6, 2008 (Dkt. No. 1).

5 7. ATD hired A&A Legal Service to serve the papers in this action and
6 to conduct such further investigations as were necessary in order to locate a valid
7 address for service of Defendants.

8 8. Attached hereto as Exhibit 4 are documents from the investigation of
9 A&A Legal Service used as a basis to locate Defendants.

10 9. Attached hereto as Exhibit 5 is a true and correct copy of a case
11 summary and proof of service in unrelated action filed in Superior Court of
12 California, Los Angeles County where papers were served listing Defendant
13 Hengyucius as an authorized agent at the El Monte address, the registered address
14 for American Seashores International, Inc. a corporation a/k/a American Tire
15 Corporation.

16 10. Attached hereto as Exhibit 6 is a true and correct copy of the Proof of
17 Service of the Summons and Complaint on Defendant American Tire Corporation
18 (“ATC”) and a Notice of Errata regarding the same (Dkt Nos. 13, 14).

19 11. Attached hereto as Exhibit 7 is a true and correct copy of an online
20 directory of private tire marketers, from Goliath Tire Business (May 2007),
21 available at http://goliath.ecnext.com/coms2/summary_0199-6518817_ITM, last
22 visited on January 27, 2009.

23 12. Attached hereto as Exhibit 8 is a true and correct copy of the Proof of
24 Service of the Summons and Complaint on Defendant Hengyucius (Dkt. No. 19).

1 13. Attached hereto as Exhibit 9 is a true and correct copy of the Clerk's
2 entry of default as to Defendant ATC for failure to answer the Complaint (Dkt. No.
3 18).

4 14. Attached hereto as Exhibit 10 is a true and correct copy of the Clerk's
5 entry of default as to Defendant Hengyucius for failure to answer the Complaint
6 (Dkt. No. 24).

7 15. Upon information and belief, during the week of September 15, 2008,
8 a reporter for a tire industry trade publication asked Defendant Hengyucius about
9 this case and provided Defendant Hengyucius with copies of the papers in this
10 case. *See infra* ¶ 18, Ex. 11.

11 16. On September 19, 2008, counsel for ATD received in the mail certain
12 papers that had been mailed to the El Monte address on August 19, 20 and 22,
13 2008 (namely, Plaintiff's Request to Clerk To Enter Default Against Defendant
14 Hengyucius with supporting declaration, Plaintiff's Notice of Motion for Default
15 Judgment and Permanent Injunction with supporting papers, and Plaintiff's
16 Corrected Notice of Motion for Default Judgment and Permanent Injunction).

17 17. On September 22, 2008, A&A Legal Service received in the mail the
18 summons and complaint that had been mailed on June 11, 2008 to Defendant ATC
19 at the El Monte address. A copy of these papers had also been hand delivered to
20 "Violet" at that address on the same date.

21 18. Attached hereto as Exhibit 11 is a true and correct copy of an e-mail
22 sent by Defendants to a trade publication reporter, dated September 22, 2008.
23

24 19. On October 16, 2008, counsel for ATD received a call from Maria
25 Tam. The next day, counsel for ATD retuned Ms. Tam's call, but she was not in
26 the office. Counsel for ATD did not hear back from Ms. Tam until November 6,
27 2008.
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1 20. Attached hereto as Exhibit 12 is a true and correct copy of a letter
2 dated October 27, 2008 from Hannah Lee, counsel for ATD, to Maria Tam.

3 21. On November 6, 2008, Maria Tam called counsel for ATD requesting
4 that ATD withdraw its motion for default. Counsel for ATD responded by e-mail
5 on November 7, 2008.

6 22. Attached hereto as Exhibit 13 is a true and correct copy of an e-mail
7 from Hannah Lee, counsel for ATD, to Maria Tam, dated November 7, 2008.

8 23. Counsel for ATD never received any communication from Maria Tam
9 or Defendants between November 7, 2008 and January 14, 2009 when Defendants
10 filed their motion to set aside the entry of default.

11 24. Attached hereto as Exhibit 14 is an excerpt from an online blog, "Who
12 is American Tire Corporation," dated September 15, 2008, available at:
13 <http://buybigtires.com/wordpress/2008/09/15/who-is-american-tire-corporation/>,
14 last visited on January 27, 2009.

15 25. Attached hereto as Exhibit 15 is a true and correct copy of the Notice
16 of Status of Service of all papers in the case on Defendants (Dkt. No. 40).

17 26. Attached hereto as Exhibit 16 is a true and correct copy of the Proof
18 of Personal Service of all papers in the case on Defendant Hengyucius (Dkt. No.
19 43).

20 27. Attached hereto as Exhibit 17 is a true and correct copy of the Proof
21 of Personal Service of all papers in the case on Defendant ATC (Dkt. No. 44)

22 28. Attached hereto as Exhibit 18 is a true and correct copy of the Contact
23 page from Defendants' website, www.americantire.us, last visited on January 27,
24 2009.

1 29. Recently, on January 15, 2009, I went to the Secretary of State
2 website for the State of New Jersey and conducted a search for corporate records
3 under the name American Tire Corporation. I did not find any incorporation
4 papers or any information that American Tire Corporation was, in fact,
5 incorporated in the State of New Jersey.

6 30. Following receipt of Defendants' motion papers, Plaintiff's counsel
7 arranged for a conference call with Defendants' counsel, which took place on
8 January 20, 2009. Plaintiff's counsel proposed various means of avoiding motion
9 practice on the default issue, including entering into a stipulation to be ordered by
10 the Court whereby Defendants would consent to jurisdiction, waive further service
11 and Defendant Hengyucius would appear for a deposition within a set time, if the
12 case could not be settled. During the call, Ms. Tam stated that Defendants had
13 shown her papers indicating that Defendant ATC was a New Jersey corporation.
14 Plaintiff's counsel asked for, but has not received, a copy of those papers. Ms.
15 Tam also indicated that Defendants would dispute jurisdiction in California,
16 despite the listing of a P.O. Box in Chino, California and a telephone number in the
17 Los Angeles area code of 626 on Defendants' website. Ms. Tam advised that she
18 would check with her client regarding the substance of the discussion and
19 Plaintiff's proposals and would get back to Plaintiff's counsel in a day or two.

20 31. Attached hereto as Exhibit 19 is a true and correct copy of an email
21 from myself to Maria Tam, dated January 21, 2009 proposing the parties agree to
22 participate in court-ordered mediation before Magistrate Judge Lum who is
23 assigned to this case.

24 32. As of Monday morning, January 26, 2009, Ms. Tam did not respond.
25 Accordingly, I sent Ms. Tam another email, which was also faxed to her office.
26 Attached hereto as Exhibit 20 is a copy of my January 26, 2009 email.
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1 33. Attached hereto as Exhibit 21 is a true and correct copy of the Proof
2 of Service of all papers in this case on Defendants at known email, mail, and fax
3 addresses (Dkt. No. 42).

4 34. After the close of business on Monday, January 26 (5:45 p.m.
5 California time), Defendants' counsel left messages and sent an email to Plaintiff's
6 counsel regarding the stipulations previously proposed by Plaintiff's counsel.
7 Attached hereto as Exhibit 22 is a true and correct copy of Ms. Tam's email to
8 myself.

9 35. In light of Ms. Tam's message, Plaintiff's counsel is in the process of
10 negotiating a possible stipulation with Defendants' counsel in an effort to resolve
11 the parties' dispute with respect to the subject motion, but has not been able to
12 finalize any agreement in light of the deadline for the filing of Plaintiff's response
13 to Defendants' Motion. Attached hereto as Exhibit 23 is a true and correct copy of
14 the email sent by myself to Ms. Tam on January 27, 2009 regarding the proposed
15 stipulation.

16 36. Attached hereto as Exhibit 24 is a true and correct copy of Trustees of
17 the S. Cal. IBEW-NECA Pension Plan v. Sabco Electric, Inc., No. CV 07-7894
18 ODW (AJWx), 2008 WL 4297223 (C.D. Cal. Sept. 15, 2008).

19 37. Attached hereto as Exhibit 25 is a true and correct copy of Grand
20 Canyon Resort Corp. v. Drive-Yourself Tours, Inc., No. CV-05-03469-PHX-
21 SMM, 2006 WL 1722314 (D. Ariz. June 22, 2006).

22 38. Attached hereto as Exhibit 26 is a true and correct copy of Resolution
23 Trust Corp. v. Bowen, No. CV-92-1671-PHX-PGR, 2008 WL 2001270 (D. Ariz.
24 May 7, 2008).

1 I declare under penalty of perjury under the laws of the State of New York
2 and the United States that the foregoing is true and correct. Executed this 27th day
3 of January in the year 2009, at New York, New York.

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5 /s/ Kathleen McCarthy
6 Kathleen McCarthy
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